State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, March 24, 2015

No. 48 Matter of Natural Resources Defense Council, Inc. v New York State Department of Environmental Conservation

The Natural Resources Defense Council, Riverkeeper and six other environmental groups filed this suit against the Department of Environmental Conservation (DEC) in 2010, claiming certain provisions of a state pollutant discharge elimination system (SPDES) permit regulating stormwater discharges by more than 500 small municipalities in New York do not comply with the federal Clean Water Act and state Environmental Conservation Law. Among other things, they argued that DEC, in drafting the statewide permit, improperly created a self-regulatory system allowing municipalities to choose their own stormwater pollution controls without DEC oversight or public participation, and that it did not require municipalities to reduce discharges to the "maximum extent practicable" or conduct monitoring of their discharges as required by state and federal law.

Supreme Court, Westchester County granted the NRDC petition in part, finding the SPDES permit "creates an impermissible self-regulatory system" that fails to ensure discharges are reduced to the maximum extent practicable. "[N]othing in the .. Permit requires DEC to review the control measures which any given [municipal] operator allegedly plans to develop to ensure that such measures will in fact reduce pollutant discharge to the [maximum extent practicable]. In effect..., each operator that submits a complete [notice of intent to discharge] is authorized to discharge stormwater while it decides for itself what reduction in pollutant discharge would meet the [maximum extent practicable] standard, what control measures should be utilized, and whether that standard will in fact be met." The court also found the permit failed to provide for federally-required public hearings on the discharge reduction targets and pollution control plans of municipalities, but it rejected most of the plaintiffs' other claims.

The Appellate Division, Second Department dismissed the NRDC petition and upheld the SPDES permit in its entirety, except for one now-uncontested issue regarding compliance schedules. It said the permit "is consistent with the scheme for general permits envisioned by the [Environmental Protection Agency]" and "requires entities seeking coverage to 'develop, implement and enforce' a stormwater management plan designed to address pollutants of concern and 'reduce the discharge of pollutants ...' to the maximum extent practicable...." The permit "does include a variety of enforcement measures that are sufficient to comply with" state and federal law, it said "Under the General Permit itself and state implementing regulations in general, the DEC is vested with sufficient authority to enforce the statutory mandates ... to reduce pollution discharge to the maximum extent practicable." Regarding hearings, it said DEC's "determination to provide for public participation in the establishment of effluent limitations at the general permit issuance and renewal stages, but not after the issuance of the general permit, is not contrary to 33 USC § 1251(e).

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To be argued Tuesday, March 24, 2015

No. 58 People v Jarrod Brown

This appeal turns on whether a parolee is in the "custody" of the Department of Corrections and Community Supervision (DOCCS) within the meaning of CPL 440.46(1), which allows certain drug offenders who were sentenced under the Rockefeller Drug Laws to apply for resentencing under the Drug Law Reform Act of 2009. As enacted in 2009, the statute applied to offenders "in the custody of the department of correctional services." Parolees, who were then in the "legal custody" of the Division of Parole pursuant to Executive Law § 259-i, were not eligible for resentencing. In 2011, a state budget bill merged Correctional Services and Parole into a single agency, DOCCS, and the statutes were amended to reflect the change, so that "[a]ny person in the custody of the department of corrections and community supervision" could apply for resentencing under CPL 440.46(1).

In 2002, Jarrod Brown pled guilty to third-degree criminal sale of a controlled substance in Queens and was sentenced to 6 to 12 years in prison. After serving nearly eight years, Brown was released on parole in April 2011, about two weeks after the merger amendments took effect, and he moved for resentencing under CPL 440.46(1). The District Attorney opposed the motion, arguing Brown was ineligible because he was on parole, not incarcerated, and thus was not in the "custody" of DOCCS.

Supreme Court granted Brown's motion and resentenced him to a seven-year prison term, saying the language of CPL 440.46(1), "as amended, does not distinguish between defendants who are incarcerated and those who are on parole." On the merits, it said Brown "appears to be a low-level drug dealer and user, and not a major participant in the illegal trafficking of drugs.... [S]ubstantial justice does not require that [his] application for resentence be denied."

The Appellate Division, Second Department affirmed. "The plain language of CPL 440.46(1) encompasses '[a]ny person in the custody of [DOCCS].' According to Executive Law § 259-i(2)(b), a nonincarcerated parolee is within the legal custody of DOCCS. Thus, a plain reading of the statute leads to the conclusion that a nonincarcerated parolee is eligible to apply for resentencing...." It said this is "entirely consistent" with the legislative history. "The Legislature clearly intended that lengthy sentences be replaced by shorter ones as a matter of course and that only in exceptional cases ... should [defendants] be deprived of the ameliorative effect of the statute."

The District Attorney's Office argues the 2011 amendments "were technical in nature, doing nothing more than conforming section 440.46 to reflect the new name of the Department of Correctional Services after it was merged with the Division of Parole. Because the operative language of the statute was not changed and because nothing in the legislative history evinces any intent to change the eligibility requirements of the statute, the amendment should have had no effect on the pool of eligible defendants." It says "the original intent behind the enactment of [CPL 440.46] was to shorten the harsh sentences of imprisonment under the Rockefeller drug laws..., not to truncate defendants' supervised transition back into society through parole."

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To be argued Tuesday, March 24, 2015

No. 59 Matter of Dempsey v New York City Department of Education

Luther Dempsey applied to the New York City Board of Education (DOE) in 2006 for certification as a school bus driver, which would permit him to drive DOE buses. He disclosed that he had two felony drug convictions in 1990 and three theft-related misdemeanors, the most recent in 1993. He explained that he had been addicted to heroin until 1994, when he entered a treatment program, but said he has been drug free since then. He obtained a commercial driver's license in 1996 and has been steadily employed, primarily as a private school bus driver. Supreme Court issued him a certificate of relief from disabilities for his crimes in 2002.

DOE denied his application based largely on the seriousness of his offenses and his "mature age ... at the time of some of the offenses," which made him "unsuitable ... for school bus service and the resultant close supervision of school children in the relative[ly] unsupervised environment of a school bus." Dempsey brought this proceeding to challenge the determination arguing, in part, that DOE violated Correction Law §§ 752 and 753, which prohibit agencies from denying a license based on an applicant's prior convictions unless there is "a direct relationship" between the license sought and the prior offenses or granting the license "would involve an unreasonable risk to property or to the safety or welfare" of the public.

Supreme Court annulled the determination as arbitrary and capricious and ordered DOE to approve Dempsey's application, saying DOE "failed to consider all eight factors" in Correction Law § 753. "A review of the papers demonstrates that [DOE] only considered petitioner's criminal history ... and failed to consider his extensive evidence of rehabilitation. Petitioner's last conviction was eighteen years ago and he obtained a certificate of relief from disabilities."

The Appellate Division, First Department reversed and denied the petition on a 3-1 vote. It said DOE's "2011 determination that petitioner's prior drug-related convictions as an adult bore on his fitness and/or ability to perform his school bus duties was rationally based, and it shows DOE gave due consideration to the relevant factors under Correction Law § 753 before denying his application. Although petitioner avers he has been drug free since 1994, and his crimes were directly related to his drug addiction at the time, the offenses were not youthful indiscretions (he was 41 years old), but were of a serious nature since each involved narcotics." The certification he sought "would place him in direct daily contact with school aged children and require him to closely monitor and supervise them...." It said the trial court "improperly reweighed the factors set forth in the Correction Law and substituted its own judgment...."

The dissenter argued the determination was arbitrary and capricious and violated the Correction Law and the state and city Human Rights Laws. DOE's review "did not properly consider the eight factors" in section 753 and was "based on inaccurate in formation," she said. "It made no reference to the time that had elapsed since the last conviction (now 20 years), petitioner's lengthy experience successfully driving school buses with the ... type of children he would be driving and supervising were the license granted, or the extensive evidence of complete rehabilitation that petitioner furnished."

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To be argued Tuesday, March 24, 2015

No. 60 Matter of Banos v Rhea
No. 61 Matter of Dial v Rhea

Tayinha Banos and Viola Dial filed these article 78 proceedings to challenge the termination of their Section 8 rent subsidies by the New York City Housing Authority (NYCHA). The defendants included NYCHA Chairman John Rhea and Dial's landlord, 690 Gates, LP. Banos and Dial argued their benefits were improperly denied because NYCHA did not comply with the notice requirements of the first partial consent judgment in Williams v New York City Hous. Auth. (US Dist Ct, SD NY, 81 Civ 1801, Ward, J., 1984). NYCHA moved to dismiss both proceedings, which were commenced more than a year after they received NYCHA's notice of default, on the ground that the four-month statute of limitations had expired.

Supreme Court denied NYCHA's motions. It said NYCHA failed to show that it followed the three-stage notice procedure specified in the Williams consent decree, which requires the Authority to first send a warning letter stating the basis for termination of benefits, followed by a notice of termination informing tenants of their right to a hearing and stating specific grounds for termination, and finally, if the tenant does not respond. a notice of default advising the tenant that the subsidy will be terminated in 45 days.

The Appellate Division, Second Department affirmed on a 3-1 vote in Banos and 4-0 in Dial, ruling the limitations period was never triggered because NYCHA did not send the warning letter or notice of termination before mailing the notice of default. "Relying on contract principles ... and reading the Williams first partial consent judgment as a whole, we conclude that the NYCHA has the burden of satisfying the condition precedent of serving all three notices ... before its determination to terminate a participant's subsidy can be considered final and binding...," it said in Dial, rejecting the First Department's contrary ruling in M/O Lopez v New York City Hous. Auth. (93 AD3d 448). Without proof that NYCHA "complied with all of the required notice procedures..., it failed to demonstrate that the statute of limitations had even begun to run. To permit the statute of limitations to depend solely upon the mailing of the [default] letter shifts the burden from the NYCHA to comply with the detailed provisions of the Williams [decree], to which it agreed to be bound, to the participants in the Section 8 program."

The dissenter in Banos rejected the argument that the limitations period was "indefinitely 'tolled'" because NYCHA failed to show it complied with the notice requirements. "The ... consent judgment itself provides that the ... determination to terminate Section 8 benefits becomes final and binding upon receipt of the [default] letter.... The fact that an agency may or may not have followed proper procedure ... relates to the merits of the underlying petition. It does not affect the finality of the agency's determination for statute of limitations purposes.... [Banos'] failure to commence this proceeding within the applicable limitations period barred the Supreme Court from considering the merits of her claims."

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For respondent Banos: Kathleen Brennan, Brooklyn (718) 422-2851
For respondent Dial: Michael Weisberg, Brooklyn (718) 237-5500
For respondent 690 Gates: Robert H. Gordon, Manhattan (646) 374-0100

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To be argued Tuesday, March 24, 2015

No. 20 People v David Rivera *(papers sealed)*

David Rivera checked himself into the psychiatric ward of Columbia Presbyterian Medical Center (CPMC) in 2007, complaining he was having suicidal thoughts. He told a psychiatrist, Dr. Anna Gross, that he believed the thoughts were connected to his sexual abuse of two nieces, who were then 11 and 13 years old. He told the psychiatrist that he had been unable to stop molesting the younger girl, who had just reported the abuse to the New York City Administration for Children's Services (ACS), and he said he expected there would be legal and familial consequences. Dr. Gross reported his statements to an ACS investigator. After Rivera was charged, the prosecutor sought to call Dr. Gross to testify about his admissions at trial. Rivera opposed the application, contending his statements to the psychiatrist were protected by physician-patient privilege under CPLR 4504.

Supreme Court granted the application in part, ruling the "full extent" of his admissions were privileged because they were necessary "to determine the appropriate diagnosis and treatment," but it allowed Dr. Gross to testify, without details, that Rivera told her he had sexually abused a niece and she reported that information to ACS. The court said People v Bierenbaum (301 AD2d 626 [1st Dept 2002]) "recognized a limited exception to the physician-patient privilege, based on Tarasoff [v Regents of Univ. of Cal. (17 Cal3d 425 [1976])] ... 'when the patient demonstrates that he poses a clear and present danger to a third party....'" Rivera's "admission to a doctor that he molested his nieces required the doctor to disclose the abuse [to ACS].... No reasonable physician ... could ignore the potential of a serious and continuing danger to the children." It said, "Allowing disclosure of admissions made in this context would have little negative effect on the goals of the privilege. And, even if it did, the societal interest in protecting children from sexual abuse clearly outweighs any interest furthered by the privilege."

Rivera was convicted of predatory sexual assault against a child and sentenced to 13 years to life in prison.

The Appellate Division, First Department reversed and remanded for a new trial. "The court should not have permitted the psychiatrist who treated defendant to testify about defendant's admissions of sexual abuse. Although the psychiatrist made a proper disclosure of the abuse," it said, citing Tarasoff and Bierenbaum, "the Tarasoff disclosure did not operate as a waiver of the physician-patient privilege.... This privilege (see CPLR 4504) is broadly construed, and it does not contain a general public interest exception.... In this case, the psychiatrist's testimony was arguably the most damaging evidence against defendant, and we do not find its admission to be harmless."

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